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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 784

HUGH GANT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 23) is reported at 152 F. 2d 106.

JURISDICTION

The judgment of the circuit court of appeals was entered December 18, 1945 (R. 24), and a petition for rehearing was denied January 16, 1946 (R. 26). The petition for a writ of certiorari was filed January 29, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and

XIII of the Criminal Appeals Rules, promulgated by this Court May 7, 1934, and *United States ex rel. Coy* v. *United States,* 316 U. S. 342.

QUESTION PRESENTED

Whether an indictment, which charged violations of the National Bank Robbery Act (12 U. S. C. 588b) by robbery of a state bank insured by the Federal Deposit Insurance Corporation, but which failed to specify that the Federal Deposit Insurance Corporation was a federal agency, was sufficient to charge an offense within the jurisidiction of a federal court.

STATUTES INVOLVED

Section 2 of the National Bank Robbery Act of May 18, 1934, c. 304, 48 Stat. 783, 12 U. S. C. 588b,[1] as of the time the acts of which petitioner was convicted took place, in pertinent part provided:

> (a) Whoever, by force and violence, or by putting in fear, feloniously takes, or feloniously attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank shall be fined not more than $5,000 or im-

[1] Subsequent amendments of Section 2 (Acts of Aug. 24, 1937, c. 747, 50 Stat. 749; June 29, 1940, c. 455, 54 Stat. 695) are immaterial to this case.

> prisoned not more than twenty years, or both.
>
> (b) Whoever, in committing, or in attempting to commit, any offense defined in subsection (a) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not less than $1,000 nor more than $10,000 or imprisoned not less than five years nor more than twenty-five years, or both.

Section 1 of this Act, as amended by Section 333 of the Act of August 23, 1935, c. 614, 49 Stat. 720, 12 U. S. C. 588a, in pertinent part provides:

> * * * as used in this Act the term "bank" includes * * * any insured bank as defined in subsection (c) of section 12B of the Federal Reserve Act, as amended.

Section 8 of the Banking Act of 1933 (Act of June 16, 1933, c. 89, 48 Stat. 168, as amended by Section 101 of the Act of August 23, 1935, c. 614, 49 Stat. 684, 685, 12 U. S. C. 264 (c) (8)) in pertinent part provides:

> The term "insured bank" means any bank the deposits of which are insured [by the Federal Deposit Insurance Corporation]; * * *.

STATEMENT

On September 23, 1936, petitioner and another were indicted in the District Court for the South-

ern District of Alabama in four counts charging violations of the National Bank Robbery Act. All four counts arose out of the same transaction; counts one and three charged robbery of a state bank whose deposits were at that time insured "by the Federal Deposit Insurance Corporation"; counts two and four charged robbery with the aggravating circumstance that the defendants had put the life of a bank employee in jeopardy by assaulting him with a pistol. (R. 1–7.) There was a general verdict of guilty as charged in the indictment, and petitioner was sentenced generally to imprisonment for twenty-five years (R. 10–11). Sentence was pronounced on March 28, 1938 (R. 11).[2] There was no appeal.

On May 2, 1945, petitioner filed in the sentencing court a "Motion for Order to Vacate Void Judgment," in which he alleged that the language of the indictment, charging robbery of a state bank insured by the Federal Deposit Insurance Corporation, was not sufficient in itself to charge a federal offense; that this was a violation of his right under the Sixth Amendment "to be informed of the nature and cause of the accusation"; and that he was unaware of this at the

[2] Petitioner has not yet begun to serve this sentence. The term is to begin at the expiration of a previous sentence imposed by the District Court for the Northern District of Florida (R. 10–11). The Florida sentence, with time off for good conduct, will expire in 1954 (Pet. 3).

time sentence was imposed (R. 11–14).[3] This motion was denied on June 26, 1945 (R. 14–15).

On July 26, 1945, petitioner filed a notice of appeal from the order denying his motion to vacate, the sole ground of appeal being that the order was erroneous (R. 15–17). On August 9, 1945, the district court entered an order extending for an additional thirty days the time "for filing and docketing the record on appeal" in the circuit court of appeals (R. 19).

The Government moved in the circuit court of appeals that the appeal be dismissed for the reason, among others, that there had been neither application for nor order granting leave to appeal (R. 21–22). The circuit court of appeals, pretermitting the question of dismissing the appeal,[4] affirmed the judgment on the merits on the

[3] Petitioner also alleged (R. 12) that he had pleaded guilty to counts one and three without the aid of counsel. This is the only thing in the record to indicate that petitioner had pleaded guilty to some of the counts of the indictment. And so far as appears from the record and the petition, there was no attempt to develop the allegation that the plea was entered without advice of counsel.

[4] Petitioner's appeal to the circuit court of appeals was governed by Section 8 (c) of the Judiciary Act of February 13, 1925, 28 U. S. C. 230, which requires that application for allowance of an appeal be made within three months after the entry of the order appealed from. *Steffler* v. *United States*, 319 U. S. 38, 40; *Wells* v. *United States*, 318 U. S. 257, 260; *United States ex rel. Coy* v. *United States*, 316 U. S. 342, 345. The appeal was improperly taken in the absence of an application and allowance, unless the notice of appeal and the order extending the time to docket the record, both of which were

authority of *Pyle* v. *Johnston*, 137 F. 2d 869 (C. C. A. 9), certiorari denied, 320 U. S. 793 (R. 23).

ARGUMENT

Petitioner's sole contention is that the indictment, in failing to state specifically that the bank which petitioner robbed was insured by an agency of the United States, failed to allege an essential element of the crime charged, and that as a consequence the judgment of conviction is void (Pet. 4–12). The argument is that the name "Federal Deposit Insurance Corporation" is not the exclu-

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filed within three months after the entry of the judgment, constituted a fitting substitute. It has been held that the mere filing of a notice of appeal is insufficient to give jurisdiction to the appellate court when application and allowance are necessary. *Alaska Packers Association* v. *Pillsbury*, 301 U. S. 174. This Court has also held that an appeal was improperly taken in a case where there was a notice plus a settling of a bill of exceptions and a denial of bail. *McCrone* v. *United States*, 307 U. S. 61, affirming 100 F. 2d 322 (C. C. A. 9); cf. *United States* v. *Cusson*, 132 F. 2d 413 (C. C. A. 2). Other cases have held that appeals were properly taken where there was notice plus approval of a supersedeas or appeal bond, or approval of a stipulation as to the contents of the record and an order transmitting exhibits. *Sage* v. *Central Railroad Co.*, 96 U. S. 712, 714; *Brandies* v. *Cochrane*, 105 U. S. 262; *Partos* v. *Pacific Coast S. S. Co.*, 95 F. 2d 738 (C. C. A. 9); *Crescent Wharf & Warehouse Co.* v. *Pillsbury*, 93 F. 2d 761, 763 (C. C. A. 9), certiorari denied, 304 U. S. 571; *Weinstein* v. *Black Diamond S. S. Corporation*, 31 F. 2d 519 (C. C. A. 2). In the light of these cases we think it may be doubted that the order extending the time for filing the record was a sufficient allowance of the appeal. However, since the petition is so plainly lacking in substance, we do not press the point.

sive possession of the federal agency of that name, since Congress has expressly provided, in forbidding the general use of the name to others, that it may still be used by any "firm, partnership or person actually engaged in business under such name or title prior to May 24, 1926"[5] (Pet. 5–7); therefore, the indictment should have specifically stated that the Federal Deposit Insurance Corporation was an agency of the United States. Petitioner also contends that he was thus deprived of his right under the Sixth Amendment because he was not fully informed of the nature of the accusation (Pet. 4, 7, 12); and that the trial court had no jurisdiction to try him because no federal offense had been charged (Pet. 5). These latter are but different ways of phrasing the single contention that the judgment is void on the face of the record for failure of the indictment to allege an offense.

We think it is quite clear that the indictment stated all the essential elements of the crime for which petitioner was convicted. An indictment need not aver matters which may be judicially noticed;[6] and when the indictment is "founded on

[5] 12 U. S. C. 585; and see 12 U. S. C. 264 (v) (1).

[6] *Pennington* v. *Gibson*, 57 U. S. 65, 80–81; *United States* v. *A. L. A. Schechter Poultry Corporation*, 76 F. 2d 617, 623 (C. C. A. 2), reversed on other grounds, 295 U. S. 495; *Summers* v. *United States*, 11 F. 2d 583 (C. C. A. 4), certiorari denied, 271 U. S. 681; *De Marco* v. *United States*, 296 Fed. 667 (C. C. A. 4), certiorari denied, 265 U. S. 593; *Stephens* v. *United States*, 261 Fed. 590 (C. C. A. 9).

a general provision defining the elements of an offense, * * * [it] need not negative the matter of an exception made by a proviso," but "it is incumbent on one who relies on such an exception to set it up and establish it."[7] The trial court was required to take judicial notice of the fact that there was a federal agency named "Federal Deposit Insurance Corporation,[8] and any further averment to that effect would have been unnecessary. It is true that under the proviso in 12 U. S. C. 585 (see p. 7, *supra*) there might possibly have been some other corporation similarly entitled. But under the rule as to negativing exceptions it was unnecessary for the Government to exclude that possibility in the indictment.[9]

Petitioner cites *Shaw* v. *United States,* 292 Fed. 339 (C. C. A. 8), and *United States* v. *Dooley,* 11 F. 2d 428 (E. D. N. Y.),[10] where it was held

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[7] *McKelvey* v. *United States*, 260 U. S. 353, 357; and see *Edwards* v. *United States*, 312 U. S. 473, 482–483; *Seele* v. *United States*, 133 F. 2d 1015, 1019 (C. C. A. 8).

[8] *Matter of Dunn*, 212 U. S. 374, 378, 384; *Cohen* v. *United States*, 129 F. 2d 733, 736 (C. C. A. 8); *Hiatt* v. *United States*, 4 F. 2d 374, 376 (C. C. A. 7), certiorari denied, 268 U. S. 704; *Hill* v. *United States*, 275 Fed. 187, 189 (C. C. A. 7). Cf. *Thornton* v. *United States*, 271 U. S. 414, 420; *Caha* v. *United States*, 152 U. S. 211, 221–222.

[9] In view of the authorities cited in notes 6, 7, and 8, it is unnecessary to make any further answer to petitioner's objections (Pet. 5–9) against *Pyle* v. *Johnston*, 137 F. 2d 869 (C. C. A. 9), certiorari denied, 320 U. S. 793, which was the sole authority relied upon by the court below.

[10] See also *Cossack* v. *Swope*, 114 F. 2d 998 (C. C. A. 9), and *Clark* v. *United States*, 24 F. 2d 696 (C. C. A. 8).

that if an indictment for embezzlement fails to allege that a national bank was a member of the Federal Reserve System, no judicial notice could be taken of the fact. But there is an obvious difference between a federal agency specifically erected and named by statute, such as the Federal Deposit Insurance Corporation (12 U. S. C. 264 (a)), and a local national bank, which may, or may not, have complied with the statutes requiring it to become a member of the Federal Reserve System as a condition to continuing its status as a national bank. And there is authority contrary to the *Shaw* and *Dooley* cases in *United States* v. *Davenport*, 266 Fed. 425, 432–433 (W. D. Tex.), affirmed *sub nom. Rheiner* v. *United States*, 276 Fed. 803, 805 (C. C. A. 5).

CONCLUSION

The decision of the circuit court of appeals is correct, and no conflict of decisions or important question of law is involved. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

J. HOWARD MCGRATH,
Solicitor General.
THERON L. CAUDLE,
Assistant Attorney General.
ROBERT S. ERDAHL,
JOSEPH M. HOWARD,
Attorneys.

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